RUBIN BROS. FOOTWEAR, INC. AND RUBIN BROTHERS FOOTWEAR, INC. *and* LOCAL 199, UNITED SHOE WORKERS OF AMERICA, CIO.[1] *Case No. 10–CA–902. June 11, 1952*

Decision and Order

On September 28, 1951, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. He also found that the Respondents had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications and additions:

1. The Respondents denied reinstatement to employee Rawlins on November 11, 1949, on the sole ground that Rawlins allegedly struck employee Odum in front of the Respondents' plant when Odum sought to return to work on October 11, 1949, during the strike. The Trial Examiner found that the Respondents failed to establish their affirmative defense that Rawlins in fact had engaged in violence and concluded that, in refusing to reemploy Rawlins, the Respondents violated Section 8 (a) (3) and (1) of the Act. The Board agrees with the Trial Examiner, but finds it necessary to modify the rule of proof heretofore applied in similar cases.

In the *Mid-Continent Petroleum Corp.* case,[2] the Board enunciated the principle that an employer who refused to reinstate strikers, even upon an honestly mistaken belief that they had engaged in forbidden conduct, had no valid defense if, in fact, the employees were not guilty of the forbidden conduct. The reason for so holding was set forth by the Board in *Standard Oil Company of California*[3] as follows:

> To hold otherwise would be to place employees who engage in lawful strike activities with the hope of returning to their jobs

[1] We are administratively advised that Local 199 is no longer in existence.
[2] 54 NLRB 912, 933–935 (1944).
[3] 91 NLRB 783, 791.

> at the end of the economic struggle at the mercy of an employer who may sincerely regard their conduct as unlawful.

We here adhere to that principle. The Board stated the applicable rule of proof in *Mid-Continent* as follows:

> Once it is pleaded . . . that the discharge was made for unlawful conduct inseparably connected with the strike, the burden was on [the employer] to show that all the striking employees discharged therefor had, in fact, been guilty of unlawful conduct. . . .

We are now of the opinion that the honest belief of an employer that striking employees have engaged in misconduct provides an adequate defense to a charge of discrimination in refusing to reinstate such employees, unless it *affirmatively* appears that such misconduct did not in fact occur. We thus hold that once such an honest belief is established, the General Counsel must go forward with evidence to prove that the employees did not, in fact, engage in such misconduct. The employer then, of course, may rebut the General Counsel's case with evidence that the unlawful conduct actually did occur. At all times, the burden of proving discrimination is that of the General Counsel. This modification of the *Mid-Continent* rule does no more than recognize the true nature of the General Counsel's obligation to establish all the essential elements of a charge that discrimination has occurred when a striking employee is refused his job. It merely places an employee's honestly asserted belief in its true setting by crediting it with *prima facie* validity.

Applying this modified rule of proof to the instant case, the Board is of the opinion that, although the General Counsel proceeded on the basis of the *Mid-Continent* rule, the issue of Rawlins' alleged misconduct was fully litigated, the Respondents having sought to prove their honest belief and the General Counsel and the Respondents having further adduced evidence as to the fact of misconduct. Accordingly, we find, upon the entire record, that Rawlins did not hit Odum [4] and did not aid or abet in the hitting of Odum.[5] We conclude

[4] We credit, as did the Trial Examiner, the testimony of Rawlins as corroborated by employee Lord and Union Organizer Cochran, and discredit the testimony of the Respondents' witnesses, employees Wells and Cowart. These credibility findings are clearly supported by the record. Contrary to the Respondents' exceptions, the Trial Examiner did not state as part of his principal findings that Rawlins was not convicted of assault by a court of law. The finding is made solely as part of the chronological background. Cf. *N. L. R. B.* v *Kelco Corp.*, 178 F. 2d 578 (C. A. 4). Nor is there merit to the Respondents' assertion that Rawlins was arrested along with other employees. As the Trial Examiner found, Rawlins was not arrested following the Odum incident, but on a warrant obtained later that day by Odum.

[5] The Respondents maintain that, even assuming Rawlins did not strike Odum, he aided and abetted in the assault. We do not agree. As the Trial Examiner found, Rawlins was one of a group of strikers who decided to ask Odum and Wells not to enter the plant. Rawlins was not, in our judgment, close enough to the violence to warrant an inference that his mere presence was sufficient to link him to the assault. Cf. *N. L. R. B.* v. *Fan-*

therefore that Rawlins engaged in protected concerted activity and that the Respondents' refusal to reinstate Rawlins constituted a violation of Section 8 (a) (3) and (1) of the Act.

2. The Trial Examiner found, as do we, that on January 25, 1950, the Respondents discharged Mildred Dean [6] in violation of Section 8 (a) (3) and (1) of the Act. The Respondents except to this finding on the ground that Dean was, in their view of the law, a "nonstriker" whose reinstatement was deferred while strikers were reemployed, and who failed to report back for work as instructed. As set forth in the Intermediate Report, Dean was employed on November 7, 1949, during the strike, joined the Union on November 14, sent a letter to the Respondents a few days thereafter to the effect that she could not cross the picket line, and applied for reemployment on January 25 with the other strikers. Dean testified credibly that Personnel Director Bryant informed her that there was no work for her but to come back in 2 weeks. Thereafter, Dean applied for employment on two occasions at 2-week intervals and finally was told that the Respondents "probably won't have anything for her." Bryant did not include Dean in the list of strikers to be rehired because Dean "came to work during the strike." By February 10, the Respondents had reinstated all strikers they considered eligible for reinstatement. However, as to Dean, Jack Rubin, comanager of the Respondents' plant, testified:

> . . . at no time did we consider Mildred Dean a striker. . . . She applied for work on January 25, and when her name came up even though at that time I already knew that she had become a union member because of a letter we had received that she would refuse to cross the picket line, I stated to the foreman and to Mrs. Bryant, that we need not consider her because insofar as we were concerned, she was not a striker, and that if we want to put her on we would do so at a later date.

Rubin also testified that he was present when Dean applied for work on January 25, and that Bryant told Dean "we didn't consider her a striker. We were only responsible according to the law, to rehire strikers only."

Thus the Respondents' refusal to reinstate Dean was motivated by the factor that Dean, in the Respondents' concept of the law, was a "nonstriker" and therefore not entitled to reinstatement. But Dean, contrary to the Respondents' mistaken view of the Act, acquired the status of an economic striker when she joined in the strike activi-

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steel Metallurgical Corp., 306 U. S. 240, 260; *The W. T. Rawleigh Company* v. *N. L. R. B.*, 190 F. 2d 832 (C. A. 7); *N. L. R. B.* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (C. A. 4); *Cory Corporation*, 84 NLRB 972, 973, footnote 5.

[6] Also referred to by her married name of Mildred Dean Burkett.

ties of the Respondents' employees. She being an economic striker, although Dean ran the risk of being permanently replaced during the strike, the Respondents were nevertheless under a duty not to discriminate with regard to her reinstatement because of her concerted or union activity.[7] Accordingly, as the Respondents refused to reinstate Dean because of her participation in the strike, it is immaterial that the Respondents in so doing acted upon a good-faith belief that Dean was a "nonstriker."[8] We find, therefore, that by refusing to reinstate Dean because of her concerted activities, the Respondents discriminated in regard to her hire and tenure of employment, thereby discouraging membership in the Union in violation of Section 8 (a) (3) of the Act. We further find that the Respondents, by discriminating against Dean, interfered with the concerted activities of their employees, in violation of Section 8 (a) (1) of the Act. Whether the discrimination be viewed as a violation of Section 8 (a) (3) or 8 (a) (1), or both, we find that the remedy of reinstatement and back pay is appropriate and necessary to remedy the unfair labor practices involved.[9]

3. We agree with the Trial Examiner's conclusion that the Respondents, by their letters of October 8, 1949, mailed to all strikers except those allegedly involved in violence, coerced their employees in violation of Section 8 (a) (1) of the Act. As the Trial Examiner found, the October 8 letters announced the opening of the plant on October 11, and referred to an enclosed card to be mailed to the Respondents "as application for reemployment if so marked." The cards provided alternative replies to be checked off indicating whether the strikers planned to return on the plant reopening date or thereafter, or were elsewhere employed, or did not wish to work. The letters concluded with the statement, "Failure to receive your card will be an indication to us that you no longer desire your job."

In our view the Respondents' letters did not call for a mere voluntary reply as to whether or not the strikers intended to return to work upon the reopening of the plant. By attaching an application for

[7] Cf. *National Grinding Wheel Company*, 75 NLRB 905, 909. As the Trial Examiner indicated, the Respondents do not contend that it was necessary to discontinue Dean's services to accomplish reinstatement of strikers with greater seniority. Moreover, we find that, as Bryant testified, there was a job available for Dean in the fitting, packing, or making departments.

[8] *American Shuffleboard Co.* v. *N. L. R. B.*, 190 F. 2d 898 (C. A. 3); *J. A. Bentley Lumber Company*, 83 NLRB 803, enf. 180 F. 2d 641 (C. A. 5); *Textile Machine Works, Inc.*, 96 NLRB 678. The Respondents also point to the fact that all strikers who applied were reinstated regardless of union affiliation or refusal to cross the picket line except those allegedly involved in violence, as evidence of lack of a discriminatory motive toward Dean. However, on November 16 or 17, Bryant marked Dean's personnel record "quit" although Bryant knew as of November 15 that Dean was out because she refused to cross the picket line. Furthermore, it appears that Dean was the only employee hired during the strike who thereafter refused to cross the picket line. In any event, unlike the Trial Examiner, we do not predicate our conclusion that the Respondents discriminated against Dean upon their antiunion animus.

[9] *J. A. Bentley Lumber Company, supra.*

reemployment and inserting a warning that failure to reply might result in termination of employee status, the Respondents, we believe, sought to compel divulgence of the strikers' back-to-work intentions. As economic strikers, however, the Respondents' employees were subject to loss of employee status by replacement, an event which had not occurred at the time of the Respondents' letters. Consequently, the Respondents could not threaten termination of employment of the strikers upon their failure to act at the Respondents' request. We find, therefore, that the Respondents, by their October 8 letters containing threats of reprisal against their striking employees, interfered with, restrained, and coerced their employees in the exercise of their rights to engage in concerted activities guaranteed by Section 7, in violation of Section (a) (1) of the Act.[10]

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, Rubin Bros. Footwear, Inc., and Rubin Brothers Footwear, Inc., Waycross, Georgia, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Shoe Workers of America, CIO, or any local union thereof, or any other labor organization of their employees by discharging or refusing to reinstate any of their employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(b) Threatening their employees with economic reprisals because of their union membership or activities.

(c) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form, join, or assist United Shoe Workers of America, CIO, or any local union thereof, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

[10] Cf. *United States Cold Storage Corporation*, 96 NLRB 1108; *American Shuffleboard Co.* v. *N. L. R. B.*, *supra*; *N. L. R. B.* v. *Electric City Dyeing Co.*, 178 F. 2d 980 (C. A. 3).

(a) Offer to Herschel Rawlins and Mildred Dean Burkett immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of the Intermediate Report entitled "The Remedy" for any loss of pay they may have suffered by reason of the Respondents' discrimination against them.

(b) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records, and all other records necessary to analyze the amounts of back pay due under the terms of this Order.

(c) Post at their plant at Waycross, Georgia, copies of the notice attached hereto and marked "Appendix A."[11] Copies of such notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondents' authorized representative, be posted by the Respondents immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Tenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply therewith.

IT IS FURTHER ORDERED that the allegations of the complaint, insofar as they allege that the Respondents violated Section 8 (a) (3) and 8 (a) (1) of the Act by the discharge of J. C. Cox and by promise of benefit be, and they hereby are, dismissed.

MEMBERS MURDOCK and STYLES took no part in the consideration of the above Decision and Order.

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in UNITED SHOE WORKERS of AMERICA, CIO, or any local union thereof, or any other labor

[11] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

organization, by discharging or refusing to reinstate any of our employees or by discriminating in any other manner in regard to the hire and tenure of their employment, or any term or condition thereof.

WE WILL NOT threaten our employees with economic reprisals because of their union membership or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist UNITED SHOE WORKERS OF AMERICA, CIO, or any local union thereof, or other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL offer to Herschel Rawlins and Mildred Dean Burkett immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and we will make each of them whole for any loss of pay suffered as a result of our discrimination against them.

RUBIN BROS. FOOTWEAR, INC.,
RUBIN BROTHERS FOOTWEAR, INC.,
Employer.

By----------
(Representative) (Title)

Dated ----------

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon a charge,[1] first amended charge,[2] second amended charge,[3] and third amended charge[4] filed by Local 199, United Shoe Workers of America, CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Tenth Region (Atlanta, Georgia), issued a complaint dated July 23, 1951, against Rubin Bros. Footwear, Inc., and Rubin Brothers Footwear, Inc., herein called Respondents, alleging that Respondents have engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) of the National Labor Rela-

[1] Filed November 18, 1949.
[2] Filed February 21, 1950.
[3] Filed April 11, 1950.
[4] Filed June 28, 1950.

tions Act, as amended, herein called the Act. With respect to unfair labor practices, the complaint alleges that Respondents discriminated against Herschel Rawlins, on or about November 11, 1949, and on or about January 25, 1950, and at all times thereafter, against Mildred Dean "on or about January 25, 1950, approximately 2 weeks subsequent to on or about January 25, 1950, and approximately 4 weeks subsequent to on or about January 25, 1950," and at all times thereafter, and against J. C. Cox, on or about February 24, 1950, and thereafter, because of their membership in and activities on behalf of the Union and because said individuals engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection. The complaint further alleges that Respondents, on or about August 9, 1949, promised economic benefits to their employees on condition that they refrain from engaging in activities on behalf of the Union, that Respondents, on or about August 6, 1949, and during March 1950, or thereabout, threatened to discharge their employees if they joined or retained membership in the Union, or engaged in activities on behalf of the Union, and that Respondents on or about October 8, 1949, "individually and unilaterally solicited their employees to abandon their lawful concerted activities and return to work."

Respondents duly filed (1) a motion to make the complaint more specific which was granted in part, (2) a motion to dismiss the complaint,[5] and (3) an answer

Pursuant to notice, a hearing was held on August 13, 14, 15, 16, and 17, 1951, at Waycross, Georgia, before the undersigned Trial Examiner. The General Counsel and Respondents were represented by counsel and the Union by J. R. Cochran. All parties participated fully in the hearing. After the close of the hearing, briefs were received from counsel for the General Counsel and from counsel for Respondents which have been considered.

Respondents' Motion to Dismiss

Respondents contend that the complaint should be dismissed because at the time of the filing of the original charge (on November 18, 1949) and prior to December 22, 1949, the Congress of Industrial Organizations, the parent federation of the charging union, was not in compliance with the non-Communist affidavit provisions of Section 9 (h) of the Act. Respondents contend that by virtue of such noncompliance the original charge, the amendments thereto, and all investigations made, are illegal and void and that therefore the complaint is not based upon a valid charge. This contention is without merit. This Board has held that the Act requires only that the Union be in compliance at the time of the issuance of a complaint. (See *Edwards Brothers, Inc.*, and cases cited therein, 95 NLRB 1328.)

On November 15, 1948, the Union filed a representation petition with the Board under Section 9 (a) of the Act.[6] Thereafter on March 18, 1949, an election was conducted and as a result thereof the Union was certified as the exclusive bargaining agent of all production and maintenance employees of Respondents at their Waycross, Georgia, plant. Throughout the representation proceeding Respondents sought dismissal of the petition on the grounds, *inter alia*, that the Congress of Industrial Organizations, the parent federation of the then petitioning union (charging union herein) was not in compliance with the non-Communist affidavit provisions of Section 9 (h) of the Act. Respondents now contend

[5] Prior to the hearing Trial Examiner Reeves R. Hilton denied the motion to dismiss without prejudice to Respondents' right to renew said motion at the hearing. This motion was renewed at the hearing and taken under consideration by the undersigned.

[6] See Case No. 10–RC–430.

that "this election was void and the charging union is not entitled as a matter of law to bring the subject complaint No. 10–CA–902." The undersigned rejects this contention. The undersigned has found no authority holding that the charging union must be certified as the bargaining agent and as noted above, the complaint is not subject to dismissal on the ground that the Congress of Industrial Organizations was not in compliance at the time the charge was filed.

Respondents contend that the allegations of the complaint concerning promises of economic benefits, threats of discharge, and solicitations to abandon concerted activities should be stricken in their entirety because some of said acts allegedly occurred during a time when the CIO was not in compliance with the non-Communist affidavit provision of the Act, and because "none of the acts mentioned in said paragraphs [of the complaint] are set out in the charge attached to the subject complaint, and the dates of said alleged acts are more than 6 months prior to the filing of the subject complaint and now barred by Section 10 (b) of the Act." These contentions are rejected. There is no requirement in the law that a labor organization, at the time it files a charge, must be in compliance with the non-Communist affidavit provisions of the Act. The original charge was filed on November 18, 1949, and alleges, *interalia*, that Respondents engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act and that Respondents by specifically alleged conduct (discrimination against named individuals) and by "other acts and conduct, within the past 6 months, the Employer [Respondents] interfered, restrained and coerced its employees in the exercise of their rights as guaranteed in Section 7 of the Act." Identical language also appears in each of the amended charges. Although the complaint amplified the allegations set forth in the charge and amended charges the allegations of the complaint are related to the allegations of the charge and amended charges and Respondents have not been prejudiced. In any event, the unfair labor practices complained of (in the complaint) were allegedly committed no longer than 6 months before the filing and service of the original charge and were therefore properly included in the complaint. (See *American Shuffleboard Co.* v. *N. L. R. B.*, 190 F. 2d 898 (C. A. 3), and cases cited therein and *Jarka Corp.*, 94 NLRB 320.) The Act bars a complaint based upon "any unfair labor practice occurring more than 6 months prior to the filing of the charge . . ." As noted above, the conduct complained of occurred within 6 months of the filing of the charge. It is not material that they did not occur within 6 months of the filing of the complaint.

Respondents' motion to dismiss is hereby denied.

There is no dispute concerning the following matters and the evidence reveals and the undersigned finds: (1) That Respondents are engaged in commerce within the meaning of the Act[7] and (2) that Local 199, United Shoe Workers of America, CIO is a labor organization within the meaning of Section 2 (5) of the Act.

Respondents deny the unfair labor practices alleged and set forth affirmative defenses, hereinafter discussed.

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[7] Respondents maintain and operate a plant at Waycross, Georgia (the only plant involved herein), where they engage in the manufacture, sale, and distribution of footwear. In the operation of this plant Respondents annually receive raw materials, principally leather, valued in excess of $500,000 and more than 90 percent thereof is received from points outside of Georgia. Annually the Waycross plant produces finished footwear valued in excess of $500,000 and more than 90 percent thereof is sold and shipped outside of Georgia.

Upon the entire record in the case, and from his observation of witnesses, the undersigned makes the following findings of fact, conclusions of law, and recommendations.[8]

The Strike

On August 9, 1949, Respondents' making department employees ceased work concertedly, went on strike, and established a picket line at the entrance to the plant. Shortly thereafter the entire plant was closed. The alleged unfair labor practices are premised, in part, upon activities in connection with and during the strike and related thereto. The record herein does not contain evidence as to the cause of the strike. However, it is noted that in Case No. 10–CA–532, involving these same Respondents,[9] it was found that the strike was caused by Respondents' unlawful refusal to bargain. It is further noted that on July 16, 1951, the National Labor Relations Board, herein called the Board, entered an order vacating decision and dismissing complaint in Case No. 10–CA–532 on the ground "that the charging labor organization, United Shoe Workers of America, CIO was not in compliance with Section 9 (h) of the Act at the time the complaint issued." Respondents seem to contend, in the instant matter, that the strike was illegal and void and consequently an unprotected activity by its employees since it was called because of Respondents' failure to recognize the United Shoe Workers of America, CIO and was called at a time when said Union was not in compliance with Section 9 (h) of the Act. The undersigned finds no authority to support this contention. The undersigned has found no authority holding a strike under these circumstances is *per se* unlawful. Furthermore, in the light of the entire Act and its legislative history it does not appear that Congress intended such an interpretation of the statute even though the *Union* could not use the processes of this Board to enforce *its* demands prior to *its* compliance with Section 9 (h) of the Act.

Herschel Rawlins

Rawlins was employed by Respondents in January 1943, but quit about 6 months thereafter. He returned to Respondents' employ about June 1948 and worked in the making department.

Rawlins joined the Union in October 1948 and was one of the employees who went out on strike on August 9, 1949. He served on the picket line "most all the time" and carried signs.

On or about October 8, 1949, Respondents mailed to their employees[10] a letter reading as follows:

> Rubin Bros. Footwear, Inc., will open its Waycross plant this Tuesday, October 11, 1949; and you are requested to report for work on that date, at your regular time.
>
> The laws of both the State of Georgia and The United States of America

[8] The testimony concerning the incidents involved in this proceeding is thoroughly conflicting and contradictory and the findings of fact made herein result from the undersigned's attempt to reconcile the evidence and determine what probably occurred. The findings of fact are based upon a consideration of the entire record and observations of witnesses. All evidence on disputed points is not set forth so as not to burden unnecessarily this Report. However, all has been considered and where required resolved. In determining credibility the undersigned has considered, *inter alia*, the demeanor and conduct of witnesses; their candor or lack thereof; their apparent fairness, bias, or prejudice; their interest or lack thereof; their ability to know, comprehend, and understand matters about which they have testified; and whether they have been contradicted or otherwise impeached.

[9] 91 NLRB 10.

[10] The letter was not sent to certain employees whom Respondents considered ineligible for employment.

guarantee your right to work, and no individual nor group may lawfully stop you.

The enclosed card to be filled in by you and mailed the same day you receive this, will be considered your application for reemployment if so marked. Failure to receive your card will be an indication to us that you no longer desire your job

Sincerely,

M. R. BRYANT, *Personnel Director*
Rubin Bros. Footwear, Inc.

The letter enclosed a self-addressed card reading as follows:

OCTOBER _____, 1949

DEAR MRS. BRYANT:

In response to the Company's letter of 10/8/ I have checked below the action I am taking:

(____) I will report for work at my regular time and place on Tuesday, October 11, 1949.

(____) I cannot report for work on Tuesday, Oct. 11, but will report on or about _____, 1949.

(____) I am employed elsewhere and wish to remain on my new job.

(____) I cannot or do not wish to, work at the present time.

Please sign your full name and last badge no.

The afore-mentioned letter and card were sent to Rawlins on or about October 8, 1949, via registered mail correctly addressed to him. Nevertheless, it was returned to Respondents unopened and stamped "Unclaimed."

On October 11, 1949, an attempt was made by Respondents to resume operations. Nevertheless, the strike, which was not terminated until January 25, 1950, continued and a large group of strikers again assembled to persuade employees not to return to work. During the lunch hour on October 11, 1949, a group of strikers intercepted Charles Wells and Thomas Odum, nonstrikers, near the entrance to the plant and attempted to dissuade them from entering the plant. A fight ensued. There is an issue of fact, which will be discussed hereinafter, as to whether Rawlins was one of the persons that hit Odum. In any event, Rawlins was arrested about 4 p. m. on October 11, 1949, pursuant to a warrant taken out by Odum and charging assault and battery. Rawlins was not convicted and this warrant was withdrawn by Odum on March 9, 1950.

On November 11, 1949, and on January 25, 1950, Rawlins applied to Respondents for reemployment. He was not reinstated and there is a dispute as to what he was told on these occasions.[11] Respondents contend that Rawlins was not reinstated because he "engaged in fighting and rioting" in front of the plant at about 12:30 p. m. on October 11, 1949.

The record herein contains considerable evidence bearing upon Respondents' good-faith belief or lack thereof that Rawlins engaged in misconduct (fighting) sufficiently flagrant as to bar reinstatement, and bearing upon the existence or nonexistence of a policy barring from employment persons engaging in fighting. However, in cases where, as here, an employer refuses reinstatement for engaging in a strike or other form of concerted activity which is not *per se* unlawful or beyond the protective scope of the Act, and justifies his action on the ground that the employee forfeited the protection of the Act by engaging in particular misconduct, the burden is on the employer affirmatively to prove the actual fact of such misconduct.[12] Thus, the questions for determination herein are: Did

[11] In view of the findings and conclusions hereinafter noted the undersigned is not resolving this dispute.

[12] *Mid-Continent Petroleum Corporation*, 54 NLRB 912, 933–934; *Porto Rico Container Corp.*, 89 NLRB 1570; *Standard Oil Company of Calif.*, 91 NLRB 783; *Ohio Associated*

Rawlins in fact engage in unprotected activity on the occasion in question (on October 11, 1949)? And, if it is found that Rawlins did in fact engage in the misconduct imputed to him, did Respondents refuse to reinstate Rawlins for this reason or for entirely different reasons (See *Wallick and Schwalm, et al.*, 95 NLRB 1262).

October 11, 1949, Incident

As noted above, on October 11, 1949, a group of strikers assembled to persuade employees not to return to work. During the lunch hour this group was assembled on the west side of the street, across from the entrance to Respondents' plant. Shortly before 12:30 p. m. Thomas Odum and Charles Wells[13] were walking on the east side of the street toward Respondents' plant. As Odum and Wells approached the plant they were observed by the assembled strikers and someone in the group[14] said, "There comes Tommy [Odum] and Charles [Wells]. *Let's go ask them not to go back to the factory*" [emphasis supplied]. At that time, Woodrow Shirey and Talmadge Gunter started walking toward Odum and Wells. Shirey and Gunter were followed closely by John Lord, James Craven, Charles Crawford, Herschel Rawlins, and other persons. While this group proceeded walking[15] toward Odum and Wells, police in the vicinity of Respondents' plant and on the same side of the street therewith, but considerable distance from Odum and Wells, also started toward these two individuals. The group with Shirey and Gunter in the forefront reached Odum and Wells before the police. Shirey, upon reaching Odum, remarked that Odum and Wells *ought not to go back to work.* Shirey struck Odum and Gunter struck Wells.[16] The evidence is conflicting as to whether others also struck Odum and concerning Rawlins' participation in this activity. The police arrived shortly after the strikers, broke up the skirmishes, and arrested certain individuals, not including Rawlins. Charles Wells, a witness with a "poor recollection"[17] (to borrow Respondents counsel's expression), and Frank Cowart, who testified he observed the incident from a second story window—about 78 feet from the incident—as witnesses for Respondent, identified Rawlins as one of those who struck Odum. Rawlins denied that he hit Odum and testified he was about 8 feet away from where Odum was standing when hit and that he (Odum) was hit only one blow and that one was delivered by Shirley. John Lord testified that he (Lord) was 2½ or 3 feet from Odum and that Odum was hit only once and that Shirey delivered this blow. Lord testified Rawlins did not hit Odum or "anybody." James Cochran[18] testified that he observed the situation as the strikers crossed the street from west to east, that he then ran to the scene of the encounter, that there he observed Shirey hit Odum one blow, that this was the only blow Odum received, and that Rawlins did not hit Odum. Odum did not testify herein and the record is silent as to why except that he is no longer in Respondents' employ, is "in the Air Corps some place," and, at the time of the hearing, was not in Waycross.

Telephone Company, 91 NLRB 932; *Jefferson Standard Broadcasting Company,* 94 NLRB 1507.

[13] Odum and Wells had worked that morning and were returning to the plant at the conclusion of the lunch period.

[14] Not otherwise identified.

[15] There is a dispute as to whether this group walked, trotted, or ran. The evidence that they trotted or ran is not convincing and is rejected.

[16] There is no contention herein that anyone other than Gunter hit Wells.

[17] Wells did not impress me as an accurate, convincing witness.

[18] Rawlins, Lord, and Cochran testified as witnesses for the General Counsel.

On the basis of the entire record herein, including the testimony of Rawlins, Lord, and Cochran, which the undersigned credits, the undersigned finds that Rawlins did not hit Odum. Furthermore, on the basis of the entire record, and especially the facts outlined above, the undersigned believes and finds that the evidence is insufficient to establish that Rawlins was "aiding and abetting" [19] in the assault and battery upon Odum and/or Wells.

It is therefore found that Respondents failed to establish the facts essential to their defense in Rawlins' case, and violated Section 8 (a) (1) and (3) of the Act by refusing to reemploy him on or about November 11, 1949, and thereafter. In view of the findings and conclusions made herein it is deemed unnecessary and inadvisable to resolve the other disputed issues, noted above, concerning the Rawlins matter.

Mildred Dean [20]

Mildred Dean was first employed by Respondents in 1946, and worked about 3 or 4 months. Dean was again employed by Respondents November 7, 1949, during the strike, and assigned a beginner's operation. On November 14, 1949, after obtaining the permission of her foreman, Lonnie Youmans, Dean left work sick. On this same date Dean joined the Union and signed a letter, written on the Union's stationery and addressed to Respondents, stating:

> GENTLEMEN:
>
> In view of the dispute now existing between Local 199 United Shoe Workers of America, CIO and Rubin Bros. Footwear, Inc. and having given the matter careful consideration I have decided not to return to work until this dispute referred to above has been settled.
>
> Immediately the difficulties now confronting the Union and the Company have been removed I shall be happy to return to my employment with Rubin Bros. Footwear, Inc. In the meantime however I cannot violate the picket line established by the Union outside the plant gates of the Company.
>
> I am
>
> Very truly yours,
>
> MILDRED DEAN, Badge No. 248

The date that Respondents received this letter is not clear from the record herein. However, it is apparent that it was received within a few days of November 14, 1949.

On November 15, 1949, Dean telephoned Respondents' personnel director, Mary Ruth Bryant, and asked for her check. Mrs. Bryant responded that Dean had signed the union card that she "wouldn't cross the picket line" and told Dean that she (Dean) "would have to go get it." [21]

On January 25, 1950, Dean applied to Respondents for reemployment and spoke with Mrs. Bryant. There is a dispute as to what was said at this time. Dean testified Mrs. Bryant told her (Dean) she (Mrs. Bryant) "didn't have anything for me, and to come back in about two weeks." Mrs. Bryant testified she (Mrs. Bryant) called the foreman (Lonnie Youmans) and he said to tell her (Dean) "to come back in two weeks to go to work" and that "is what I [Mrs. Bryant] told her [Dean]." On cross-examination Mrs. Bryant revised her testimony as to what Youmans had told her concerning Dean, and testified that although You-

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[19] See *The W. T. Rawleigh Company* v. *N. L. R. B.*, 190 F. 2d 832 (C. A. 7), and cases cited therein.

[20] Now married and known as Mildred Burkett. Record does not reveal date of marriage but does reveal that at the time she worked for Respondents she was known as Mildred Dean.

[21] Mrs. Bryant did not deny this conversation.

mans had not definitely promised a job for Dean she (Mrs. Bryant) determined, on her own, to reemploy Dean, either in Youmans' department or elsewhere, and, therefore, told Dean to report in 2 weeks ready for work. Youmans testified he told Mrs. Bryant to tell Dean "to report back in two weeks and we would see what we could do."[22] On the basis of the entire record and observations of the witnesses, the undersigned credits Dean's version of this conversation.

Dean testified credibly that she again sought reinstatement 2 weeks after January 25, 1950, and that on this occasion she was told by Mrs. Bryant that she (Mrs. Bryant) "didn't have anything for me, and to come back in two more weeks." Mrs. Bryant testified that Dean did not apply for work after January 25, 1950, and that she did not have "any sort of application for reemployment on the part of Mildred Dean after January 25, 1950." Mrs. Bryant was not a consistent or convincing witness and her testimony in this regard is not credited by the undersigned.

Dean testified credibly that 2 weeks thereafter (4 weeks after January 25, 1950), she telephoned Mrs. Bryant and Mrs. Bryant said:

> Mildred, I told you before when you were here, that I did not have anything for you, and I probably won't have anything.

Mrs. Bryant testified that Dean never telephoned her "about working again" after January 25, 1950. This testimony is not credited.

Respondents make much of the fact that the record reveals that cards and letters indicating that the signers thereof would not cross the picket line were received by Respondents from people who were thereafter employed. Whether these people were discriminated against was not litigated herein. Furthermore, the record does not reveal whether they were employees of Respondents prior to the beginning of the strike or, like Dean, nonstrikers first employed during the strike who later refused to cross the picket line.[23] In any event, the mere fact that these people were reinstated is not sufficient to establish that Dean was not discriminated against.

Respondents seem to contend that since Dean became an employee after the strike started they were under no obligation to reinstate her at the termination of the strike on January 25, 1950.[24]

While Respondents may have had the right to discontinue Dean's services if necessary to accomplish reinstatement of the strikers,[25] there is no contention that such was necessary. The only contention made herein is that Dean was accepted for employment but did not thereafter appear for work. As indicated above, the evidence does not substantiate this position.

On the basis of the entire record the undersigned believes and finds that the reason assigned by Respondents for not reinstating Dean was not the true

[22] Youmans' statement is consistent with other evidence in the record indicating that the return of the strikers was under consideration and certain adjustments were anticipated and that Respondents on January 25, 1950, may not have been in a position to determine definitely whether they had further need for Dean's services. Mrs. Bryant's testimony that in any event she rehired Dean is not consistent therewith and if Mrs. Bryant was reinstating Dean in any event, then it does not appear likely that she would delay such reinstatement 2 weeks.

[23] In those instances where dates of employment are revealed the record establishes that these were people employed by Respondents prior to the strike who returned the card mailed to them by Respondents. The card is set forth above under the section entitled "Herschel Rawlins." From aught that appears in this record Dean was the only person first employed after the strike began who later refused to cross the picket line and was thereafter not reinstated.

[24] The normal obligation not to discriminate against Dean because of her union membership and activity is not challenged by Respondents.

[25] Striking employees with greater seniority than Dean.

grounds therefor and that Dean was not reinstated on and after January 25, 1950, because of her membership in and activities on behalf of the Union.

J. C. Cox

J. C. Cox first started working for Respondents on May 26, 1949. He was discharged February 24, 1950.

Cox joined the Union about August 8, 1949. During the strike, which started on August 9, 1949, and terminated January 25, 1950, Cox served on the picket line and carried a sign. He was one of the employees who notified Respondents in October 1949 that he would not cross the picket line.

Cox was reinstated February 1, 1950. He wore his union button "right on my belt, right next to my shop badge."

The circumstances leading to Cox's discharge and conversations at the time of the discharge are disputed.

Cox worked at sole dressing and at "sole stamping—bottom stamping." [26] During the times material herein Cox was the only regular sole stamper in Respondents' employ.

According to Cox, on the morning of February 22, 1950, Foreman Alton Bryant [27] placed a stamp in the stamping machine and told Cox to stamp "the three cases of boots." Cox thereafter stamped for a while, but left that job and went to sole dressing.[28] About 3:30 p. m., according to Cox, Foreman Bryant came to him (Cox) and "pointed" [29] and said "you better catch up on the stamper." Cox thereafter stamped three cases (72 pairs) of boots. As hereinafter noted these boots should not have been stamped.

Foreman Bryant denied telling Cox "to bottom stamp some shoes [30] contrary to the information on the tickets" (instruction sheets) and denied directing Cox "to stamp any shoes contrary to his tickets." Foreman Bryant also denied going near where Cox was working and raising his (Bryant's) arm "in a horizontal position and directing him [Cox] to stamp those shoes." On cross-examination Bryant testified he was not sure whether he told Cox, on February 22, 1950, to stamp boots or not and that he might have. Gladys McCabe, forelady in the packing room where Cox worked, testified Foreman Bryant was not in the packing room "in the afternoon during the time the boots were stamped." In any event, there is no evidence that Foreman Bryant told Cox to disregard the written instructions on the cases of boots under consideration. Each case of boots or shoes, when in the packing room, carries a ticket specifying the work to be done on the contents of the case and among other things, specifies whether the boots or shoes are to be stamped and, if so, the particular stamp to be used. It is the responsibility of the person working on the boots or shoes to read this ticket and follow its instructions. Cox admitted knowledge of this responsibility and testified he nevertheless did not read the tickets that afternoon and volunteered that he did not read them because Foreman Bryant "pointed to the machine and said 'stamp the boots' so I naturally did." On the basis of the entire record herein, the undersigned is not convinced that Foreman Bryant's manner indicated Cox was to stamp the boots regardless of the written instructions.

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[26] Sole stamping is an operation whereby an impression is made upon the soles of shoes or boots with a heated die.

[27] Foreman over cutting room and packing department.

[28] There is not enough work stamping to keep the stamper constantly employed at that operation and ordinarily the stamper (in this instance, Cox) switches between that job and another (in this instance, sole dressing) as the work load requires.

[29] Pointed to the "same kind of boots" Cox had stamped that morning.

[30] No significance is attached to the use of the term shoes. The record reflects the terms shoes and boots are used interchangeably.

The boots under consideration were stock boots (not for any particular customer) and the instruction tickets so indicated and did not call for stamping. Nevertheless, as noted above, Cox did not follow these instructions and stamped the boots. He stamped them with a stamp reading,[31]

Cowpuncher, Made expressly for Loeser's
Brooklyn, Garden City, Bayshore

Because of the type of boot stamped (a stitch down boot) the mistake was irreparable (it was not feasible to remove the impression burned into the sole, or to revise the impression or to remove the sole and place another sole on the upper section of the boot).

Gladys McCabe testified that about 3:55 p. m. on February 22, 1950, she "stopped and picked up a shoe off the case J. C. [Cox] was stamping" and Cox asked, "These don't get bottom stamped, do they?" and she answered, "Did you read your ticket?" and Cox responded, "No, I didn't." McCabe testified she and Cox then read the ticket and noted "it didn't call for any stamp." McCabe testified Cox asked "if I [McCabe] would like for him to take it off" and she answered that "he couldn't get it off" and Cox then wanted to know "what we were going to do with them" and she answered, "I didn't know whether we could do anything with the shoes or not, because it has the man's name on it. They were made expressly for him. I will talk to Mr. Rubin and tell you in the morning." Cox testified he did not see McCabe "that afternoon," that he didn't think that, and didn't remember that, McCabe came to his machine about 5 minutes to 4 that afternoon. Cox denied that he remarked to McCabe, at the machine, "Looks like I have stamped these wrong," and testified that he did not know he "had stamped them wrong until February 24." On the basis of the entire record and observations of witnesses the undersigned credits McCabe's testimony outlined above.

Shortly after closing time (shortly after 4 p. m.) on February 22, 1950, McCabe told Foreman Bryant about the boots in question and Bryant said he would talk to Mr. Rubin. That same afternoon Foreman Bryant conferred with Jack Rubin, comanager, and it was agreed that Cox would be laid off for a week or two.

On February 23, 1950, Cox was absent from work. He testified he was sick, that he suffered from a nose bleed, and that he went to see Avner Davis, a faith healer, about this condition and while there his nose stopped bleeding. Cox tried to leave the impression that while at Davis' house he (Cox) was "so weak" he could not walk. Avner Davis did not corroborate Cox's testimony. In fact, in essential parts, Davis contradicted Cox. Cox testified he did not have a telephone in his house but that he "went to a friend's house to send word to my foreman I couldn't be there today, but he was already gone." In any event, Cox did not advise Respondents that he would not be in to work on February 23, 1950. However, that date between 7:20 and 7:30 a. m.[32] Cox was observed within a few feet of the entrance to Respondent's plant.[33] Cox denied being at the plant at the time in question. This denial is not credited by the undersigned.

On February 24, 1950, Cox reported for work at the usual hour. Shortly thereafter he was discharged. Cox's testimony concerning the discharge was:

TRIAL EXAMINER WHEATLEY: Now, Mr. Cox, as I understand you, on February 24, you went to work at the usual hour, is that correct, sir?

THE WITNESS: Yes, sir.

[31] This was the same stamp used by Cox on the same type of boots during the morning.

[32] Cox was due to report for work at 7:30 a. m.

[33] Gladys McCabe, Mary Ruth Bryant, Ollie Thompson, Milley Wildes, Talmadge Wildes, and Mary Beverly testified, credibly, that they so observed Cox.

TRIAL EXAMINER WHEATLEY: What time of day was it?

THE WITNESS: 7:30.

TRIAL EXAMINER WHEATLEY: What time of day was it you were discharged?

THE WITNESS: Oh, that must have been about a quarter to eight, because I had just started to work after 7:30.

TRIAL EXAMINER WHEATLEY: Now, Mr. Cox, I want you to tell us, as near as you can remember, everything that happened at the time of your discharge. What was said to you and who said it. Who was there—what you said—just relax and let me have it.

THE WITNESS: You mean that morning of February 24?

TRIAL EXAMINER WHEATLEY: That is correct.

THE WITNESS: Well, I went to work, and went on up to work and waited around until it was 7:30, and went to my table, and picked up three shoes, and sewed three shoes, and about that time Mr. Bryant come and said, "Come here."—motioned for me, and said, "What am I going to do with this?", and pointed to three cases of boots. And he said, "What am I going to do with these?" and I said, "I don't know." He said, "You stamped them wrong." Said, "They was a special order and wasn't supposed to be stamped."

Before I could say anything, he said, "I had better let you go. Come go with me", and we went to the office. He didn't say a thing else.

When we got to the office he told Mrs. Bryant to give me time, and let me go. So all she said—and she said, "The boots wasn't supposed to have been stamped—they was on a special order." That was all she said.

TRIAL EXAMINER WHEATLEY: Now, didn't you testify somewhere in your examination that at the time you were discharged, Mr. Bryant made some mention of the fact that you did not work the day before?

THE WITNESS: Yes, sir. He asked me where I was yesterday.

TRIAL EXAMINER WHEATLEY: All right. Can you recall anything else said in this conversation?

THE WITNESS: Yes, He asked me where—"Where were you yesterday?". I said, "Home, sick." He said, "Are you sure?", and I said, "Yes. Positive." That was all that was said about that.

TRIAL EXAMINER WHEATLEY: Do you recall anything else that was said—anything else discussed, or even mentioned?

THE WITNESS. No. That is all.

Foreman Bryant testified he asked Cox "how come" he stamped the boots and Cox answered he "didn't know." Bryant testified he (Bryant) then said, "You didn't read your ticket" and Cox answered, "No, sir." Bryant testified he then said, "Didn't I always tell you to read them?" and Cox answered, "Yes, sir." According to Bryant, he then asked Cox, "Were you sick yesterday?" and when Cox responded "yes" asked him (Cox) "Weren't you out in front?" Bryant testified Cox said, "no, sir" and that when he (Bryant) said, "Are you sure?" Cox "didn't answer me." Bryant testified:

> I told him I was going to take him on down and pay him off—that he was in the front——.

According to Foreman Bryant, he and Cox then went to the personnel office where

> I told her [Mrs. Bryant] to pay him off; that he messed up some work and laid out the next day, and was sawn [sic] in front of the factory. And she [Mrs. Bryant] asked him what was the matter with him, and he said

he was sick. She said, "But you could have come in the office. You were down in front." And he said he was not down in front. She said she saw him. He said yes he was there. That was all he said.

Personnel Director Bryant testified that on February 24, 1950, Foreman Bryant brought Cox to her office and told her to pay off Cox, that Foreman Bryant stated that he (Cox) had stamped the shoes wrong and didn't come in, and he (Cox) told him (Foreman Bryant) that he wasn't out in front of the plant the day he (Cox) didn't come in. Personnel Director Bryant testified she then asked Cox "why he didn't come in" and he said "he was sick." Personnel Director Bryant testified she said "couldn't you have let us know?" and remarked that he (Cox) "was out front" and Cox said "he wasn't" but changed his answer to "yes, he was out in front, and just left it like that" and didn't offer any excuse for not coming in, after she (Personnel Director Bryant) said "J. C. [Cox] I saw you."

The undersigned credits this testimony of Foreman Bryant and Personnel Director Bryant[34] and finds the substance of the conversations to be as testified to by them.

Foreman Bryant testified that he anticipated laying off Cox for a week or two but changed his mind when Cox told him "a story, that he wasn't at the factory," and discharged him because "he told me a story, that he wasn't at the factory."

Respondent's answer alleges that Cox was discharged because of a combination of reasons (1) because he stamped several cases of shoes incorrectly thereby causing substantial loss to Respondents, (2) because shoes improperly stamped by Cox were shipped to one customer with the stamp mark of another customer, thereby causing great embarrassment to Respondents, and (3) because he failed to appear for work the following day (day after improper stamping) without excuse although he came to the door of the Waycross plant at 7:30 a. m. The evidence belies the second reason assigned.

Respondent's brief assigns as the reason for Cox's discharge:

> (a) Bad work of a large number of shoes at the finishing stage when the shoes were not repairable thereby causing substantial loss to Respondents.
>
> (b) An unjustified lay off without notice to Respondent when the facts showed that notice could have been given.
>
> (c) Falsification with reference to being present at Respondent's plant on the morning of February 23, 1950.

Counsel for the General Counsel seems to contend, in his brief, that since one of the reasons assigned, in Respondent's answer, for the discharge of Cox was not true that all of the reasons assigned therefor should be rejected. The undersigned does not agree. It appears that Respondent's lawyer amplified, in the answer and brief, the reasons given him by Respondent's personnel manager and in doing so extended one portion of the answer beyond that which could be supported by evidence. In other respects the answer and brief appear consistent with the reasons assigned at the time of discharge. Furthermore, the evidence tends to support these reasons which are not inconsistent with one another or inconsistent with the testimony of Foreman Bryant. In any event, on the basis of the foregoing and the entire record, the undersigned believes and finds the evidence adduced not sufficient to support the allegations of the complaint concerning Cox.

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[34] Although the undersigned has rejected Mrs. Bryant's testimony on other matters, her testimony with respect to this matter is corroborated by surrounding circumstances and is therefore credited.

Solicitations to Return to Work

As noted above, under the section entitled Herschel Rawlins, Respondents by letter dated October 8, 1949, solicited strikers to return to work, advising them, "Failure to receive your card [to return enclosed card to Respondents, properly marked] will be an indication to us [Respondents] that you no longer desire your job."

Viewed in the light of the findings made in Case No. 10–CA–532, involving these same Respondents,[35] this solicitation constituted an integral part of a pattern of illegal opposition to the purposes of the Act and was conducted under such circumstances, and in a manner reasonably calculated to undermine the Union and to demonstrate that Respondents sought individual rather than collective bargaining. However, there is a serious question as to whether this solicitation may be viewed in the light of the findings made in Case No. 10–CA–532 since, as noted above, the Board vacacted its decision and dismissed the complaint in that case. Nevertheless, it seems evident from the facts in the instant matter that this letter and card were part of a maneuver to induce the strikers to abandon the strike and return to work and that the advice that a failure to return the card will be an indication that the strikers "no longer desire your job" was coercive in effect. The undersigned believes and finds that by this conduct Respondents violated Section 8 (a) (1) of the Act. (See *American Shuffleboard Co.* v. *N. L. R. B.*, 190 F. 2d (C. A. 3);[36] and *Happ Brothers Company, Inc.*, 90 NLRB 1513.)

Threats

Charles Crawford testified that about the middle of March 1950, he (Crawford) talked to Jack Curry, an edge trimmer, in the presence of John Lord, another employee, about the Union and that shortly thereafter Foreman Albert Dowling talked to Curry. According to Crawford, about "an hour or hour and a half" later he (Crawford) observed Foreman Dowling and John Lord talking and "walked over there" and when he approached them, Foreman Dowling said:

> Charley and John, if I ever hear tell of either one of you trying to get anybody to join the Union I will fire both of you.

John Lord corroborated Crawford's testimony. Foreman Albert Dowling did not testify herein. The undersigned finds the facts to be as testified by Crawford and Lord and finds that by this conduct Respondents violated Section 8 (a) (1) of the Act.

Promise of Economic Benefits

There is no evidence herein supporting the allegation of the complaint that Respondents "promised economic benefits to their employees on conditions that they refrain from engaging in activities on behalf of the Union" (paragraph 16 of the complaint) and it will be recommended that these allegations be dismissed.

Ultimate Findings and Conclusions

In view of the foregoing, and upon consideration of the entire record, the undersigned finds and concludes:

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[35] 91 NLRB 10.

[36] Enforcing 92 NLRB 1272.

1. That Respondents on or about November 11, 1949, and at all times thereafter failed and refused to reemploy Herschel Rawlins because of his membership in and activities on behalf of the Union and because he engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

2. That Respondents on or about January 25, 1950, and at all times thereafter, failed and refused to reemploy Mildred Dean (Mildred Burkett) because of her membership in and activities on behalf of the Union and because she engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

3. That Respondents by the foregoing conduct discriminated with respect to hire and tenure of employment and discouraged membership in the Union and interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.

4. That Respondents by solicitations to abandon the strike and by threats of reprisals interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act.

5. That the aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act.

6. That the evidence adduced is not sufficient to sustain the allegations of the complaint to the effect that Respondents discriminatorily discharged J. C. Cox.

7. That the evidence does not support the allegations of the complaint to the effect that Respondents "promised economic benefits to their employees on condition that they refrain from engaging in activities on behalf of the union" (paragraph 16 of the complaint).

The Remedy

Having found that Respondents have engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents discriminated in regard to the hire and tenure of employment of Herschel Rawlins and Mildred Dean (Mildred Burkett), it will be recommended that Respondents offer these employees immediate and full reinstatement to their former or substantially equivalent positions [37] without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay they may have suffered by reason of the discriminations against them. The losses of pay shall be computed from the date of the discrimination to the date of a proper offer of reinstatement. In computing the losses of pay, the customary formula of the National Labor Relations Board shall be followed. See *F. W. Woolworth Company*, 90 NLRB 289.

In order to insure expeditious compliance with this recommended order it will be further recommended that Respondents, upon reasonable request, make available to the Board and its agents all records pertinent to an analysis of the amount due as back pay and pertinent to the reinstatement recommendations herein made.

[37] In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is interpreted to mean "former position wherever possible and if such position is no longer in existence, then to a substantially equivalent position." See: *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

Respondents' illegal activities, including the aforesaid refusals to reinstate, go to the very heart of the Act and indicate a purpose to defeat self-organization of their employees and that other unfair labor practices proscribed by the Act are to be anticipated from Respondent's conduct in the past. The preventive purpose of the Act will be thwarted unless the order herein is coextensive with the danger. Accordingly, in order to make effective the interdependent guarantees of the statute and thus effectuate the policies of the Act, it will be recommended that Respondents cease and desist from engaging in the unfair labor practices found and from in any other manner infringing upon the rights of employees guaranteed by the Act and that Respondents post the notice attached hereto as Appendix A. (See *Standard Dry Wall Products, Inc.*, 91 NLRB 544.)

Since it has been found that the evidence is not sufficient to sustain the allegations of the complaint, to the effect that Respondents discriminatorily discharged J. C. Cox, and not sufficient to sustain paragraph 16 of the complaint, it will be recommended that these allegations be dismissed.

[Recommendations omitted from publication in this volume.]

THE L. B. HOSIERY CO., INCORPORATED AND LEE MAISEL, D/B/A MYERSTOWN HOSIERY MILLS *and* AMERICAN FEDERATION OF HOSIERY WORKERS. *Case No. 4-CA-59. June 11, 1952*

Supplemental Decision and Order

On March 10, 1950, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding, which order was thereafter enforced by the United States Court of Appeals for the Third Circuit by a decree entered on April 18, 1951. The decree provided, *inter alia*, that the Respondents make whole certain of their employees for losses of pay suffered by reason of the Respondents' discrimination against them. On October 3, 1951, the Board issued an order remanding the proceeding to the Regional Director and ordering that a further hearing be held for the purpose of adducing evidence with respect to the amounts of back pay to which the discriminatees might be entitled.

On February 8, 1952, Trial Examiner Louis Plost issued his Supplemental Intermediate Report and Recommendations finding that certain of the discriminatees were entitled to specified amounts of back pay and that no back pay was due certain other discriminatees, as set forth in the copy of the Supplemental Intermediate Report and Recommendations attached hereto. Thereafter, the Respondent L. B. Hosiery Co., Incorporated, herein referred to as the Respondent, filed exceptions to Supplemental Intermediate Report, record and proceedings, the General Counsel filed exceptions to Supplemental Intermediate Report, and both filed supporting briefs.